THE
UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 31 SPRING 1964 NUMBER 3

FINALITY OF IMMIGRATION AND NATIONALITY DETERMINATIONS—CAN THE GOVERNMENT BE ESTOPPED?†

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THERE are obvious difficulties in attempting to relate doctrines of res judicata and estoppel and cognate judicial concepts to administrative determinations. Consequently some authorities have declared that the sovereign United States cannot be estopped and that the Government cannot be prejudiced by the action or omission of a single officer.[1] Similar declarations can be found in the decisional literature of immigration and nationality.[2] While it is true that these precepts

† The opinions expressed are the author's and do not necessarily represent the views of the Department of Justice.

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1 *E.g.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

2 *E.g.*, Pearson v. Williams, 202 U.S. 281, 284 (1906); Bridges v. United States, 199 F.2d 811, 826 (9th Cir. 1952), *rev'd*, 346 U.S. 209, 234 (1953) (dissent, in decision reversing lower court on another ground); United States *ex rel.* Vajta v. Watkins, 179 F.2d 137 (2d Cir. 1950); United States *ex rel.* Lapides v. Watkins, 165 F.2d 1017, 1019 (2d Cir. 1948); Chin Kai Su v. Dulles, 157 F. Supp. 190 (E.D.N.Y. 1957); Mannerfrid v. Brownell, 145 F. Supp. 55, 56 (D.D.C.), *aff'd*, 238 F.2d 32 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1017 (1957); *cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157 (1963) (although finding no estoppel, assumes U.S. may be estopped); McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960) (misleading statements); Choy Yuen Chan v. United States, 30 F.2d 516, 517 (9th Cir. 1929) (admission as citizen).

have been disputed by some courts and scholars,[3] they unquestionably represent the prevailing view.[4]

Experience teaches, however, that such generalizations are treacherous, particularly in specific and appealing factual situations. Moreover, all of us know that judicial attitudes are constantly changing, and that the immutable dogmas of yesterday often become the rejects of today. This process of re-evaluation has been accelerated in recent years by changes in the personnel of the United States Supreme Court: The accession of a single new Justice can, and sometimes does, mean a change in direction.

The possible applicability of res judicata, estoppel and like principles in immigration and nationality matters has received passing mention in some discussions of the general subject, but has never been studied in detail. It should be of interest therefore, to explore and compare with developing standards of finality in other areas of administrative regulation the many facets of legislative, judicial and administrative policy in immigration and nationality matters.

The immigration and nationality laws doubtless occupy a special place in the folklore of adjudication. The courts frequently have gone to great lengths to avoid the severe impact of these laws in individual cases.[5] But amelioration is to some extent governed and limited by statutory directives. Statutes, however, consist of words, and since it is a prime judicial function to construe (or perhaps "construct"[6]) the language of statutes, statutory language generally leaves a wide area for judicial maneuver, sometimes in directions that may be surprising.

An illustration of these tensions between statutory directive and judicial preference may be found in the decisions dealing with efforts to invoke the principles of estoppel and res judicata in immigration and nationality matters. To some extent these principles have been con-

[3] See 2 DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 17.01-17.09 (1958); GELLHORN & BYSE, ADMINISTRATIVE LAW 1168, 1207 (4th ed. 1960). Among other valuable discussions and reviews of federal and state authorities are: Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954); Groner & Sternstein, *Res Judicata in Federal Administrative Law*, 39 IOWA L. REV. 300 (1954); Parker, *Administrative Res Judicata*, 40 ILL. L. REV. 56, 77-78 (1945); Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 5, 198; *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 865 (1952); Note, 49 COLUM. L. REV. 640 (1949); Note, 4 RUTGERS L. REV. 706 (1950); Note, 49 YALE L.J. 1250 (1940).

[4] DAVIS, *op. cit. supra* note 3.

[5] *E.g.*, Rosenberg v. Fleuti, 374 U.S. 449 (1963); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

[6] Clark, J., dissenting in Rosenberg v. Fleuti, *supra* note 5, at 463: "'statutory construction' means to me that the Court can *construe* statutes but not that it can *construct* them."

sidered by the courts as overlapping.[7] In many instances the courts have avoided mention of res judicata or estoppel but have dealt in other terminology, such as "voluntariness,"[8] "laches,"[9] "equitable results,"[10] "law of the case"[11] or "due process."[12] The controlling considerations may vary with the different areas in which the problems arise. We will therefore examine those areas separately. Our primary concern will not be with the precise terminology of estoppel, but rather with efforts to preclude the Government from asserting a fact or legal postulate that normally would be available.

I. Effect of Administrative Determinations

A logical starting point for our discussion is with the effect of administrative determinations on subsequent proceedings. Such determinations are potent and their consequences far-reaching. They can bar or permit entry into the United States.[13] They can terminate the privilege of an alien to reside in the United States.[14] They can rule for or against claims to United States citizenship.[15] They can prolong or curtail temporary sojourns in this country.[16] They can furnish documents attesting lawful alien or citizen status.[17] Are such determinations binding on those who make them and on others? Can they be disregarded when future occasion or need arises?

The answer to these questions depends, of course, on an evaluation of competing interests. On the one hand is a desire for assurance that

7 See, *e.g.*, Mannerfrid v. Brownell, 145 F. Supp. 55 (D.D.C.), *aff'd*, 238 F.2d 32 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1017 (1957); Bridges v. United States, 199 F.2d 811 (9th Cir. 1952), *rev'd*, 346 U.S. 209 (1953).

8 See cases cited notes 136-38 *infra*.

9 Costello v. United States, 365 U.S. 265, 281 (1961).

10 McLeod v. Peterson, 283 F.2d 180, 187 (3d Cir. 1960); United States v. Anastasio, 226 F.2d 912 (3d Cir. 1955), *cert. denied*, 351 U.S. 931 (1956); Uyeno v. Acheson, 96 F. Supp. 510, 520 (W.D. Wash. 1951).

11 Mannerfrid v. Brownell, 145 F. Supp. 55 (D.D.C.), *aff'd*, 238 F.2d 32 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1017 (1957); United States *ex rel.* Koehler v. Corsi, 60 F.2d 123 (2d Cir. 1932).

12 See United States *ex rel.* Durante v. Holton, 228 F.2d 827 (7th Cir.), *cert. denied*, 351 U.S. 963 (1956); United State *ex rel.* Marino v. Holton, 227 F.2d 886 (7th Cir. 1955), *cert. denied*, 350 U.S. 1006 (1956); United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Cal. 1959).

13 Immigration and Nationality Act §§ 235-36, 66 Stat. 198 (1952), 8 U.S.C. §§ 1225-26 (1958).

14 Immigration and Nationality Act §§ 241-42, 66 Stat. 204 (1952), as amended, 8 U.S.C. §§ 1251-52 (1958).

15 Ng Fung Ho v. White, 259 U.S. 276 (1922); United States v. Ju Toy, 198 U.S. 253 (1905).

16 8 C.F.R. § 214.1 (1963).

17 See notes 61 and 116 *infra*.

official rulings can be relied on and that controversies be finally resolved —a desire which also underlies the principle of res judicata. On the other hand is the need to make certain that governmental benefits will be granted only in conformity with law. In the last analysis, the choice between these alternatives often will be governed by an assessment of legislative goals, provided they are consistent with the mandates of the Constitution.

1. *Entry of Aliens into the United States*

This is an area in which the legislative purpose is clearly articulated. Congress has declared that an alien can achieve lawful entry into the United States only upon strict compliance with the qualifications and procedures prescribed by law, and it has insisted that no alien entrant or applicant for entry is afforded any security of status if it appears that he has not complied with those requirements.

This legislative design emerges at the very inception of the process for entry into the United States. A prerequisite to entry by an alien is the procurement of a visa from an American consul stationed in a foreign country.[18] Consular officers are authorized to issue visas and are prohibited from issuing them to aliens who appear to be inadmissible under the requirements established by Congress.[19] In passing upon visa applications, consuls do not conduct formal hearings but make their determinations on the basis of the documents submitted by the applicants.[20]

Under the terms of the statute, a consul's denial of a visa is not subject to review, even by the Secretary of State,[21] although in recent years an informal review procedure has been established by the Department

18 Aliens seeking permanent entry are required to obtain immigrant visas. Immigration and Nationality Act §§ 101(a)(16), 211, 66 Stat. 169, 181 (1952), 8 U.S.C. §§ 1101 (a)(16), 1181 (1958). Aliens seeking temporary entry are required to obtain nonimmigrant visas. Immigration and Nationality Act §§ 101(a)(26), 212(a)(26), 66 Stat. 169, 184 (1952), 8 U.S.C. §§ 1101(a)(26), 1182(a)(26) (1958).

19 Immigration and Nationality Act § 221, 66 Stat. 191 (1952), 8 U.S.C. § 1201 (1958).

20 Immigration and Nationality Act § 222, 66 Stat. 193 (1952), 8 U.S.C. § 1202 (1958); 22 C.F.R. §§ 41.110, 42.110 (Supp. 1963).

21 Immigration and Nationality Act § 104(a), 66 Stat. 174 (1952), 8 U.S.C. § 1104(a) (1958). The statutory provision, which bars administrative review, is criticized in *Whom We Shall Welcome*, REPORT OF PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION at 146-52 (1953); Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A.J. 1109 (1955); Wildes, *Review of Denial of Visa*, 142 N.Y.L.J., Nos. 96, 97, and 98; 36 INTERPRETER RELEASES 331, 344 (1959). In addition, the consul's denial of a visa has not been deemed subject to judicial review. United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929). See Note, 39 COLUM. L. REV. 502, 505 (1939).

of State.[22] And even the consul's issuance of a visa does not assure the holder of admission to the United States if, upon arrival at a port of entry, he is found to be inadmissible.[23] The law requires that the substance of this directive be printed upon every visa application.[24] And it authorizes the consul or the Secretary of State, in his discretion, to revoke the visa after it has been issued.[25] The Attorney General and his subordinates are required to turn back all persons they find not entitled to enter, including those to whom visas have been issued.[26] Thus it can be stated unequivocally that the issuance of a visa does not preclude challenge to the alien's right to enter.

The same lack of finality attaches to a document known as a re-entry permit, issued by the Attorney General to an alien in the United States who seeks to make a temporary visit abroad.[27] The law states that a re-entry permit shall be acceptable in lieu of a visa as a document needed for entry but that it shall have no other effect than to show that its holder is returning from a temporary visit abroad.[28] Although an unimpeached re-entry permit is entitled to prima facie effect,[29] the holder of such a document may be excluded, upon his return to the United States, if the re-entry permit was improperly issued[30] or the alien is found otherwise excludable.[31] The courts have refused to endorse any

22 22 C.F.R. §§ 42.130, 41.130 (Supp. 1963). The State Department's procedures are described and defended in Auerbach, *The Administration of the Immigration Laws by the Department of State and the Foreign Service*, 36 INTERPRETER RELEASES 6 (1959), Visa Office Bulletin No. 40 (1959); Auerbach, *The Visa Process and Review of Visa Applications*, 37 INTERPRETER RELEASES 305 (1960), Visa Office Bulletin No. 63 (1960).

23 Immigration and Nationality Act § 221(h), 66 Stat. 192 (1952), 8 U.S.C. § 1201(h) (1958).

24 *Ibid.*

25 Immigration and Nationality Act § 221(i), 66 Stat. 192 (1952), 8 U.S.C. § 1201(i) (1958). In addition, see 22 C.F.R. § 42.134 (Supp. 1963).

26 Immigration and Nationality Act §§ 221(h), 235(b), 236-37, 66 Stat. 192, 199, 200 (1952), 8 U.S.C. §§ 1201(h), 1225(b), 1226-27 (1958).

27 Authorized by Immigration and Nationality Act § 223, 66 Stat. 194 (1952), 8 U.S.C. § 1203 (1958).

28 Immigration and Nationality Act § 223(e), 66 Stat. 195 (1952), 8 U.S.C. § 1203(e) (1958).

29 United States *ex rel.* Iodice v. Wixon, 56 F.2d 824 (2d Cir. 1932); United States *ex rel.* Poppovich v. Karnuth, 25 F. Supp. 883 (W.D.N.Y. 1938).

30 Yoshihara v. Carmichael, 115 F.2d 110 (9th Cir. 1940) (original entry not lawful); United States *ex rel.* Lamp v. Corsi, 61 F.2d 964 (2d Cir. 1932) (same); United States *ex rel.* Poppovich v. Karnuth, *supra* note 29 (same).

31 United States *ex rel.* Leon v. Murff, 250 F.2d 436 (2d Cir. 1957) (sexual deviate); United States *ex rel.* Barber v. Rietmann, 248 F.2d 118 (9th Cir. 1957) (had claimed relief from military service); *Ex parte* DiStephano, 25 F.2d 902 (D. Mass. 1928) (illiterate); United States *ex rel.* Matterazza v. Fogarty, 13 F. Supp. 403 (W.D.N.Y. 1936) (public charge).

element of estoppel arising from the issuance of such visas or re-entry permits.[32] They have ruled that, regardless of any document he may have received, any alien who seeks to enter the United States can gain admittance only if he is found admissible at the time of his application for entry.[33]

Is an alien's status less vulnerable if he has passed the scrutiny of immigration officers and has been admitted to the United States? Here again the explicit statutory pattern appears to require a negative answer.

The statute erects an elaborate mechanism for preventing unlawful entries. Immigration officers are authorized to inspect all arriving aliens and to detain those not "clearly and beyond a doubt entitled to land."[34] Those detained in this manner ordinarily are referred to a special inquiry officer who conducts a formal hearing to determine their admissibility.[35] On the basis of this hearing the special inquiry officer is empowered to admit the applicant or to direct that he be excluded and deported.[36] The statute specifies that the special inquiry officer's decision excluding an alien "shall be final unless reversed on appeal to the Attorney General."[37] An administrative appeal to the Board of Immigration Appeals is provided by regulation[38] and there is a limited opportunity for judicial review.[39]

Under the terms of the statute finality is accorded only to a special inquiry officer's decision *excluding* an applicant.[40] The necessary implication is that the admission of an alien is not intended to be an

32 Chang Chan v. Nagle, 268 U.S. 346 (1925); Alarcon-Baylon v. Brownell, 250 F.2d 45 (5th Cir. 1957).

33 Sohaiby v. Savoretti, 195 F.2d 139 (5th Cir. 1952); Del Castillo v. Carr, 100 F.2d 338 (9th Cir. 1938); United States v. Parisi, 24 F. Supp. 414 (D. Md. 1938); and cases cited notes 30-32 *supra*.

34 Immigration and Nationality Act § 235(b), 66 Stat. 198 (1952), 8 U.S.C. § 1225(b) (1958).

35 Immigration and Nationality Act § 235(c), 66 Stat. 198 (1952), 8 U.S.C. § 1225(c) (1958), authorizes exclusion without a hearing in exceptional cases, on the basis of confidential security information. See Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); *cf.* Chew v. Colding, 344 U.S. 590 (1953).

36 Immigration and Nationality Act § 236(a), 66 Stat. 200 (1952), 8 U.S.C. § 1226(a) (1958).

37 Immigration and Nationality Act § 236(c), 66 Stat. 200 (1952), 8 U.S.C. § 1226(c) (1958).

38 8 C.F.R. § 236.5 (1963).

39 § 106(b) of the Immigration and Nationality Act, 66 Stat. 174 (1952), as amended, 8 U.S.C. § 1105(a)(b) (Supp. IV, 1963), now restricts such review to habeas corpus. Before this amendment became effective in 1961, declaratory review under the Administrative Procedure Act was available. Brownell v. Shung, 352 U.S. 180 (1956).

40 Immigration and Nationality Act § 236(c), 66 Stat. 200 (1952), 8 U.S.C. § 1226(c) (1958).

irrevocable act. This implication is reinforced by a number of explicit edicts. Thus, the statute specifies that a determination admitting an alien shall be subject to challenge by any other immigration officer, who can refer the matter to a special inquiry officer.[41] Another provision of the statute commands the expulsion, after entry, of any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."[42] Still another directive explicitly applies the latter mandate to aliens who have entered improperly at any time in the past.[43] And the courts have upheld the retroactivity of that directive even though it specifies no period of limitation.[44]

Thus the alien in our midst has no ultimate security of status. Even though he has been granted a visa and been passed by an immigration officer, he has acquired no immunity from deportation, and can be expelled at any time if it later is ascertained that his entry was induced by fraud or was otherwise irregular. And such insecurity may continue even after he has acquired citizenship by naturalization, since his naturalization may be subject to revocation at any time if it is discovered that his original entry was tainted by deception.[45]

In practice, of course, this phenomenon actually affects only a minute proportion of the hundreds of thousands of aliens who come to the United States each year. Virtually all of the inadmissibles have been winnowed out by the consuls in considering whether to issue a visa, and the holder of such a document is virtually certain to be passed by the immigration officers. And the right to continued residence of those admitted by immigration officers hardly ever is questioned.[46] Moreover, the law affords many opportunities for amelioration for an alien resident in this country whose entry is found to have been irregular.[47] Yet the ad-

41 Immigration and Nationality Act § 235(b), 66 Stat. 198 (1952), 8 U.S.C. § 1225(b) (1958). The purpose of this provision is not clear and its practical impact is negligible.

42 Immigration and Nationality Act § 241(a)(1), 66 Stat. 204 (1952), 8 U.S.C. § 1251 (a)(1) (1958).

43 Immigration and Nationality Act § 241(d), 66 Stat. 204 (1952), 8 U.S.C. § 1251(d) (1958).

44 Lehmann v. United States *ex rel.* Carson, 353 U.S. 685 (1957); Mulcahey v. Catalanotte, 353 U.S. 692 (1957); Marcello v. Bonds, 349 U.S. 302 (1955).

45 Immigration and Nationality Act § 340, 66 Stat. 260 (1952), 8 U.S.C. § 1451 (1958).

46 In fiscal year 1962, 283,763 alien immigrants were admitted for permanent residence. In the same year 7,637 aliens were deported and less than half of these deportations resulted from irregularities in entry. In the latter group only a negligible number actually had been in possession of immigrant visas at the time of their entry. 1962 INS ANNUAL REPORT 21, 66.

47 See GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE ch. 7 (1959); Gordon, *Discretionary Relief from Deportation*, Decalogue Journal, Sept.-Oct. 1960, p. 6; Maltin, *Relief from Deportation*, 38 INTERPRETER RELEASES 150 (1961).

ministrative authorities are empowered to expel those they have admitted if it later develops that they were deceived or mistaken. Through the years they have exercised this authority in many cases, even where the irregularity was long undetected and their decrees have always been approved by the courts.[48]

One may inquire whether there is any room for the application of the principle of res judicata to entry cases. On their face, the statutory prescriptions we have discussed appear to exclude such a possibility. Moreover, the process of issuing a visa or of admitting an alien to this country, when no question as to his admissibility is apparent, lacks the formality of adjudication which engendered the judicial principle of res judicata.[49] Perhaps a distinction might be made, however, when the alien's admissibility has been approved by a special inquiry officer. Such an officer, as we have noted, renders his decision on the basis of a hearing at which testimony is taken and the facts are developed. The proceedings before him thus may be characterized as quasi-judicial.

This very problem was considered in 1906 by the Supreme Court in *Pearson v. Williams*.[50] There an alien was admitted by a board of special inquiry, a three member body which then performed the functions now reposed in the special inquiry officer.[51] A month later deportation proceedings were brought before the same board of special inquiry and a hearing was conducted on the same issue—excludability as a contract laborer. Deportation was ordered on the ground that the alien was excludable at the time of his entry. The Supreme Court, speaking through Mr. Justice Holmes, found that deportation was not precluded by res judicata and declared that the policy of the statute

> obviously was to give a chance for fuller investigation than is possible at the moment of landing, when any inquiry necessarily must be of a very summary sort. . . . The board is an instrument of the executive power, not a court. It is made up . . . of the immigrant officials . . . , whose duties are declared to be administrative by § 23. Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense. . . . The board has no power to compel witnesses to attend, but, . . . must decide upon such evidence as is at hand or is readily accessible. These are considerations against the likelihood that

48 See cases cited note 44 *supra*.

49 RESTATEMENT, JUDGMENTS (1942), specifies on page 2 that it "does not deal with the effect of the decisions of administrative tribunals."

50 202 U.S. 281 (1906).

51 This function was first assigned to a single officer in 1952. See S. REP. No. 1137, 82d Cong., 2d Sess. 28 (1952); H.R. REP. No. 1365, 82d Cong., 2d Sess. 56 (1952).

> Congress meant such decisions to be binding upon the Secretary of Commerce and Labor, the superior officer of the members of the Board.[52]

In the ensuing fifty-seven years, this holding, insofar as it deals with the rights of aliens, has never been questioned, qualified or even reconsidered by any court.[53] But time has eroded some of the assumptions upon which Mr. Justice Holmes relied. Proceedings before special inquiry officers are by no means as summary as they were in 1906. Indeed, in some respects they resemble a judicial trial. Every effort is made to assemble all the evidence before arriving at a decision and in some instances this process may be quite prolonged.[54] While the proceeding is pending the applicant usually is permitted to enter the United States under parole.[55] He may be represented by counsel and the Government may be represented by a trial attorney.[56] The special inquiry officer now has power to subpoena witnesses.[57] Thus the special inquiry officer's consideration in quite different from the summary inquiry envisaged by Mr. Justice Holmes.

It is by no means certain, however, that these changes require an abandonment of the *Pearson* doctrine. Many authorities still adhere to the Holmes view that res judicata does not inhibit administrative reconsideration of prior determinations that do not conform to law.[58] Account also must be taken of the positive expressions of legislative policy requiring expulsion of all aliens who were inadmissible at the time of entry and declaring that only exclusionary decisions of special inquiry officers shall be final.[59] The courts might well conclude, as they have under comparable circumstances in denaturalization cases,[60] that Congress intended the deportation process as a cumulative protection of

52 202 U.S. at 284-85.

53 See Chan v. United States, 30 F.2d 516, 517 (9th Cir. 1929), where the court declared that that decision of a board of special inquiry should be given prima facie effect. However, this involved a person who had been admitted as an American citizen. The special rules applied in such cases are discussed at notes 108-26 *infra*.

54 See, *e.g.*, Matter of M—, 8 I. & N. Dec. 24 (A.G. 1958).

55 See Immigration and Nationality Act § 212(d)(5), 66 Stat. 182 (1952), 8 U.S.C. § 1182(d)(5) (1958); Ma v. Barber, 357 U.S. 185, 190 (1958); Petluck, *New Detention Policy of the I.N.S.*, 32 INTERPRETER RELEASES 110, 111 (1955).

56 Immigration and Nationality Act § 292, 66 Stat. 235 (1952), 8 U.S.C. § 1362 (1958) (right to counsel); 8 C.F.R. § 236.2(c) (1963) (assignment of trial attorney). See Gordon, *The Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961).

57 Immigration and Nationality Act § 235(a), 66 Stat. 198 (1952), 8 U.S.C. § 1225(a) (1958); 8 C.F.R. § 287.4 (1963).

58 See notes 2, 32 and 33 *supra*.

59 See notes 23, 26, 37, 42 and 43 *supra*.

60 See notes 192-201 *infra*.

the public interest against fraud or illegality in the original proceeding. On the other hand, in recent years the courts have sought to alleviate the severities of the deportation statutes against longtime alien residents of this country. Experience has demonstrated that the courts, if they are so disposed, will find a way to read the language of such statutes as permitting a result they deem desirable.

Possibly the problem we have discussed is largely hypothetical. It is unquestionably true that the administrative authorities ordinarily will not attempt deportation proceedings in a matter which was thoroughly litigated at the time of entry unless there is strong evidence of fraud. Yet such cases may develop, and in that event efforts may be made to reappraise the *Pearson* doctrine in the light of modern conditions.

2. *Grant of Lawful Status to Aliens in the United States*

The immigration law now sanctions a number of discretionary devices by which the Attorney General may grant permanent lawful residence to aliens whose status in the United States is irregular. Among these are remedies known as suspension of deportation,[61] adjustment of status,[62] registry[63] and waiver of inadmissibility.[64] Such relief may be granted by the Attorney General, after submission to him of an application and accompanying documents, upon his determination that the applicant has satisfied the prescribed statutory qualifications and merits the exercise of discretion. A formal hearing is not necessarily entailed although, since 1962, applications for suspension of deportation, adjustment of status and registry may be submitted and considered during the deportation proceeding.[65]

What security of status does the grant of such relief by the Attorney General afford to the alien in the United States? In 1950, a United States Court of Appeals invalidated an administrative regulation which pur-

61 Immigration and Nationality Act § 244, 66 Stat. 214 (1952), as amended, 8 U.S.C. § 1254 (Supp. IV, 1963). Suspension of deportation waives deportability and grants lawful permanent residence status.

62 Immigration and Nationality Act § 245, 66 Stat. 217 (1952), as amended, 8 U.S.C. § 1255 (1958). Adjustment of status grants lawful permanent residence status to certain aliens in the United States who would be immediately entitled to immigrant visas if they were abroad.

63 Immigration and Nationality Act § 249, 66 Stat. 219 (1952), as amended, 8 U.S.C. § 1259 (1958). Registry creates a record of lawful admission for permanent residence for certain longtime resident aliens whose original entry was irregular.

64 Immigration and Nationality Act §§ 212(c), (f), (g), (h), 66 Stat. 182 (1952), 8 U.S.C. §§ 1182(c), (g), (h), (i) (1958), and § 241(f), 66 Stat. 204 (1952), as amended, 8 U.S.C. § 1251(f) (Supp. IV, 1963). These statutes permit waiver of some grounds of inadmissibility for certain aliens with long residence or with close family ties in the United States.

65 8 C.F.R. § 242.17 (1963).

ported to grant authority to revoke a certificate of registry obtained by fraud, finding it precluded by the absence of direct statutory authority and suggesting that the only remedies were a court action for rescission or a criminal prosecution.[66] While the court may have been too niggardly in its view of an administrative agency's capacity to deal with fraud, it appears to have been influenced by the existence of specific statutory authority to revoke other types of certificates[67] and by the knowledge that Congress could easily remedy the deficiency exposed by the decision. Support for the belief that such a certificate cannot easily be disregarded also may be found in the ruling of another Court of Appeals refusing denaturalization where an unrevoked registry certificate had been fraudulently procured.[68] This ruling no doubt also was attributable to special circumstances—the fact that evidence of the fraud had been in the Government's files at the time of naturalization and the particular deference shown by the courts to established citizenship rights. Despite these cases, however, it is doubtful that the award of discretionary dispensation assures full security of status.

In the 1952 codification of the immigration laws, Congress explicitly authorized administrative rescission of suspension of deportation, adjustment of status or registry if the Attorney General was satisfied that the grantee "was not in fact eligible" for such relief.[69] If the grantee obtained naturalization on the basis of the award of lawful residence status which was thereafter revoked, denaturalization proceedings could be brought against him.[70]

The statute prescribes a five year statute of limitation for such administrative rescission proceedings.[71] This may mean that after five years the Government is precluded from rescinding a grant of suspension of deportation, adjustment of status, or registry although other remedies such as a court proceeding to nullify the grant may still be open.[72]

Having granted such lawful residence status, are the administrative

66 Jeager v. Simrany, 180 F.2d 650 (9th Cir. 1950).

67 See note 121 *infra*.

68 United States v. Anastasio, 226 F.2d 912 (3d Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

69 Immigration and Nationality Act § 246(a), 66 Stat. 217 (1952), 8 U.S.C. § 1256(a) (1958). The administrative process for accomplishing such rescissions is set forth in 8 C.F.R. § 246 (1963).

70 Immigration and Nationality Act § 246(b), 66 Stat. 218 (1952), 8 U.S.C. § 1256(b) (1958).

71 Immigration and Nationality Act § 246(a), 66 Stat. 217 (1952), 8 U.S.C. § 1256(a) (1958).

72 See Quintana v. Holland, 255 F.2d 161 (3d Cir. 1958), which found that a decision rescinding suspension of deportation was too late if made more than 5 years after the grant. However, the court did not discuss the possible availability of other remedies.

authorities free to ignore this grant if it later appears that the award should not have been made? Analogy to the entry cases would appear to support the view that the grant may be disregarded if the applicant actually was unqualified at the time the grant was made. On the other hand, specific statutory provision for a rescission proceeding[73] would appear to suggest that the grant is to be honored unless the statutory rescission procedure is followed.[74]

This problem has not yet been definitively settled. One administrative ruling deemed the statutory procedure exclusive, and found it "improper" to disregard an unrescinded grant of lawful status through registry.[75] Another, however, ruled that, like an admission to the United States, the remedy of adjustment of status did not waive excludability or deportability and that it could be disregarded if improperly obtained.[76] A court decision on a related problem has found an alien in irregular status in the United States who had been granted a former remedy known as pre-examination,[77] which approved his leaving the United States and returning as a lawful permanent resident, was nevertheless deportable if he was inadmissible at the time of his re-entry.[78] The court found deportation not precluded by res judicata or estoppel. Perhaps this decision can be distinguished on several grounds: (1) Pre-examination did not in itself accord permanent status; (2) There was no specific statutory provision for rescission of pre-examination; (3) In re-entering

73 Another grant for which the statute expressly provides a revocation procedure relates to preliminary petitions, commonly called visa petitions, for the approval of preferred status for certain immigrants and nonimmigrants. See Immigration and Nationality Act § 206, 66 Stat. 181 (1952), 8 U.S.C. § 1156 (1958); 8 C.F.R. § 206 (1958). A cumulative sanction in such cases would be a refusal of the consul to issue a visa or the refusal of immigration officers to permit entry, even in the face of an unrevoked visa petition. See notes 19 and 26 *supra*.

74 In a number of other situations the statute does not specifically prescribe for revocation of a dispensation, once it is allowed. See, *e.g.*, Matter of T—, 9 I. & N. Dec. 239 (1961), in which an extension of temporary stay was revoked, despite the absence of direct statutory sanction.

75 Matter of V—, 7 I. & N. Dec. 363 (1956). See note 63 *supra*. For similar results see Matter of S—, 7 I. & N. Dec. 536 (1957) (permission to reapply after deportation, no direct provision for revocation); Matter of G— A—, 7 I. & N. Dec. 274 (1956) (waiver of inadmissibility, no direct provision for revocation, disregard would be "repugnant").

76 Matter of S—, 9 I. & N. Dec. 548 (1962).

77 Pre-examination was an administrative device which was ended in 1952 and largely supplanted by the remedy known as adjustment of status. See S. REP. No. 1515, 81st Cong., 2d Sess. 603-06 (1950); Matter of B—, 5 I. & N. Dec. 542 (1953).

78 Mannerfrid v. Brownell, 238 F.2d 32 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1017 (1957), expressly approving lower court in 145 F. Supp. 55 (D.D.C. 1956). *But cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157 (1963), in which the Court articulated dictum that "the United States may be estopped to deny even an erroneous prior determination of status . . . ."

the United States, the alien became subject to the explicit statutory formula barring inadmissibles; (4) The court did not regard itself bound by an administrative ruling.

In any event, it seems that there is an unexplained disparity of treatment between aliens acquiring permanent residence status through entry into the United States and those granted such status in this country. For the former, no statute of limitations for deportation is prescribed; for the latter, the statute fixes a five year period of limitation for rescission of the grant. The status of the former apparently can be challenged at any time if they were improperly admitted; at least in some instances, the status of the latter may be secure after five years and possibly cannot be questioned even during the five year period unless a rescission proceeding is brought.

No reasonable basis for such diverse treatment is apparent. If a determination improperly granting lawful status for an entrant is assailable at any time, it would appear that a similar determination granting such status for an alien already in the United States should be similarly vulnerable. Conversely, if it is deemed desirable to fix a five year period of limitation for withdrawing a grant of residence status to those in the United States, it is difficult to see why similar benefits should not be accorded to those awarded permanent residence through a determination made at the time of entry. In their present form, of course, the statutes provide differently for these two situations. But a cogent argument could be made for establishing a consistent pattern.

3. *Prior Deportation Proceeding*

The expulsion of an alien resident of the United States patently is a matter of the utmost gravity. The proceedings to make such a determination have consequently been fashioned to assure a maximum of fair consideration. The process, of course, is administrative, not judicial. But the Supreme Court long ago declared that procedural due process was a necessary prerequisite to a deportation order, and that this entailed a fair hearing with notice of the charges; an opportunity to confront, examine and cross-examine witnesses; to be represented by counsel; and to have a decision based on substantial evidence in a hearing record.[79] These essentials of procedural due process are now incorporated in the statute.[80] Under current procedure a full hearing, which has become increasingly formalized over the years, is conducted before a special inquiry

[79] Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); The Japanese Immigrant Case, 189 U.S. 86 (1903).

[80] Immigration and Nationality Act § 242(b), 66 Stat. 209 (1952), 8 U.S.C. § 1252(b) (1958).

officer.[81] The respondent can be represented by counsel,[82] and in contested or unusual cases the Government is represented by a trial attorney.[83] Either party can appeal the special inquiry officer's decision to the Board of Immigration Appeals, an administrative body established by the Attorney General's regulations.[84] In some instances the Attorney General himself may review the Board's decision.[85] And a person whose deportation is ordered can obtain judicial review.[86]

The deportation proceeding thus resembles a judicial trial in many respects, particularly in its emphasis on a fair hearing and fair consideration. It could therefore be argued that there is room for the application of some form of res judicata. The absence of a statutory injunction against finality similar to that leveled against determinations of admissibility lends support to the argument. The statute merely says that an order of deportation "shall be final,"[87] and that direction has been construed to relate merely to the terminal point of the administrative proceeding and to the availability of judicial review.[88] It says nothing about the amenability of the decision to re-examination or to the finality of a decision that an alien resident is not deportable.

Attempts to invoke res judicata or some analogous principle as to determinations in deportation cases have thus far been inconclusive. The question has been raised most frequently when an alien who has been deported succeeds in re-entering the United States irregularly and attempts to attack the original expulsion order in the new deportation proceedings based on his irregular re-entry after deportation. This is the obverse of the situation we have discussed in other contexts since res judicata, if applied, would be invoked by the Government, rather than against it.

The administrative authorities initially ruled that the original deportation order could not be collaterally attacked in this manner.[89] This posi-

81 *Ibid.;* 8 C.F.R. § 242.8(a) (1958).

82 Immigration and Nationality Act §§ 242(b), 292, 66 Stat. 209, 235 (1952), 8 U.S.C. §§ 1252(b), 1362 (1958). See Gordon, *Right to Counsel in Immigration Proceedings,* 45 MINN. L. REV. 875 (1961).

83 8 C.F.R. § 242.9(b) (Supp. 1963). For statutory authorization see note 80 *supra.*

84 8 C.F.R. § 242.21 (Supp. 1963).

85 8 C.F.R. § 3.1(h) (Supp. 1963).

86 Immigration and Nationality Act § 106, 75 Stat. 651 (1961), 8 U.S.C. § 1105(a) (Supp. IV, 1959-62). See also Gordon, *Judicial Review of Immigration Decisions,* 37 INTERPRETER RELEASES 289 (1960); Note, *Deportation and Exclusion,* 71 YALE L.J. 760 (1962).

87 Immigration and Nationality Act § 242(b), 66 Stat. 209 (1952), 8 U.S.C. § 1252(b) (1958).

88 Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

89 Matter of C—, 8 I. & N. Dec. 611 (1960); Matter of C—, 8 I. & N. Dec. 276 (1959).

tion was unqualifiedly upheld in the early court decisions,[90] which relied on a statutory prohibition against the re-entry of an alien who had been deported pursuant to law unless he had obtained the Attorney General's permission to return.[91] One court observed that a deportee had no right to re-enter the United States in violation of the immigration laws even if it were assumed that the deportation was wrong.[92] Another court found that the prior deportation had fixed the law of the case.[93] While later decisions have adhered to this proposition, they have added a caveat that the initial deportation may be challenged if it is shown to have involved a "gross miscarriage of justice."[94]

No case has elaborated what would be considered a "gross miscarriage of justice" for this purpose or actually applied the concept to nullify a prior deportation. Debatable statutory constructions or evaluations of evidence apparently would not suffice for this purpose. A flagrantly improper statutory construction, an obviously unsubstantial evidentiary base, or a manifest denial of due process, on the other hand, might persuade a court to intervene. In any event, in assessing alleged manifest injustice, the courts will consider the amount of time that the deportee has permitted to elapse before contesting the deportation.[95] The trend of adjudication thus far appears to point in the direction of expanded judicial inquiry in this area.[96] A 1961 enactment, however, precludes judicial review of an order of deportation or of exclusion if the alien has departed the United States after the issuance of the order.[97] While this statute is not directly concerned with administrative re-examination,

90 United States *ex rel.* Bartsch v. Watkins, 175 F.2d 245, 247 (2d Cir. 1949); Daskaloff v. Zurbrick, 103 F.2d 579 (6th Cir. 1939); United States *ex rel.* Koehler v. Corsi, 60 F.2d 123 (2d Cir. 1932).

91 Now codified in Immigration and Nationality Act § 212(a)(17), 66 Stat. 183 (1952), 8 U.S.C. § 1182(a)(17) (1958).

92 United States *ex rel.* Bartsch v. Watkins, 175 F.2d 245, 247 (2d Cir. 1949).

93 United States *ex rel.* Koehler v. Corsi, 60 F.2d 123 (2d Cir. 1932).

94 DeSouza v. Barber, 263 F.2d 470 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959); United States *ex rel.* Rubio v. Jordan, 190 F.2d 573 (7th Cir. 1951); United States *ex rel.* Steffner v. Carmichael, 183 F.2d 19 (5th Cir.), *cert. denied*, 340 U.S. 829 (1950); Spinella v. Esperdy, 188 F. Supp. 535 (S.D.N.Y. 1960).

95 Mesina v. Rosenberg, 278 F.2d 291 (9th Cir. 1960) (long period of acquiescence barred challenge); DeSouza v. Barber, 263 F.2d 470 (9th Cir. 1959), *cert. denied*, 359 U.S. 989 (1959) (same, claim of lack of due process).

96 See McLeod v. Peterson, 283 F.2d 180, 184 (3d Cir. 1960). In Marcello v. Kennedy, 194 F. Supp. 748 (D.D.C. 1961), *aff'd on other grounds*, 312 F.2d 874 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 933 (1963), the district court entertained a challenge to the manner in which a deportation order had been executed but found the challenge unsubstantiated.

97 Immigration and Nationality Act § 106(c), 75 Stat. 653 (1961), 8 U.S.C. § 1105a(c) (Supp. IV, 1959-62).

it may be relevant in appraising the legislative intent. In any event, it may not be adequate cause for assault on the original decision that the controlling rule has been changed by subsequent judicial decisions, or by statute.[98]

On the opposite side of the coin, if deportation proceedings have been brought against an alien and have been dismissed by the administrative authorities, can new deportation proceedings later be brought against the same alien? This is a question which has had surprisingly little consideration, probably because new proceedings are rarely brought after one effort has failed.

It is settled that deportation proceedings do not impose criminal punishment,[99] and the inhibition against double jeopardy consequently does not apply. It seems equally obvious that dismissal of a deportation proceeding does not confer eternal absolution which shields the alien from a later proceeding based on new, or different, misconduct or upon a new statutory ground. A debatable issue may arise, however, when a new deportation proceeding is brought on the same charge, if the former proceeding was dismissed after full consideration because the evidence was inadequate or because of procedural irregularity.

An illustration of such multiple consideration occurred in the famous *Bridges* case. In 1938, a deportation charge that Bridges was then a member of the Communist Party was dismissed by a special examiner. In 1940, after amendment of the statute to reach past membership in the Communist Party, new deportation proceedings were brought before a different special examiner predicated on a charge that Bridges had been a member of the Communist Party. This time deportation was ordered, but the order was vacated by the Supreme Court, principally for procedural errors.[100] The Court did not discuss the applicability of res judicata, although the lower court decisions it reversed had found that res judicata did not bar the second deportation proceeding.[101] In 1945, Bridges was naturalized without objection and in 1949 he was prosecuted for falsely denying in the naturalization proceeding that he was a member of the Communist Party. The United States Court of Appeals for the Ninth Circuit affirmed his conviction on this charge and specifically held

98 United States *ex rel.* Steffner v. Carmichael, 183 F.2d 19 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950) (subsequent Supreme Court decision); Matter of R—, 4 I. & N. Dec. 173 (1950) (same); Matter of P—, 3 I. & N. Dec. 818 (1949) (same); Matter of R—, 3 I. & N. Dec. 605 (1949) (same).

99 Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952).

100 Bridges v. Wixon, 326 U.S. 135 (1945).

101 Bridges v. Wixon, 144 F.2d 927, 936 (9th Cir. 1944); *Ex parte* Bridges, 49 F. Supp. 292 (N.D. Cal. 1943).

that the 1938 dismissal of the deportation proceeding was not res judicata nor did it estop the criminal prosecution. The court reasoned that res judicata applied only to judicial decisions and did not bar reconsideration of the same matter by an administrative agency or a court.[102]

This conviction was reversed by the Supreme Court on another ground, and the majority did not discuss res judicata.[103] The minority opinion of Mr. Justice Reed, joined by Mr. Chief Justice Vinson and Mr. Justice Minton, favored upholding the conviction and found it not foreclosed by res judicata, since there "has been no court holding that Bridges has not been a Communist."[104] Even the minority thus was concerned at most with the binding effect of an administrative decision in a subsequent criminal proceeding.

In neither of its two *Bridges* decisions, then, did the Supreme Court grapple directly with the issue we are considering. The only other decision that may be relevant involved a situation where a court had found the evidence insufficient to support a deportation order but had held the case in abeyance for several years to permit further investigation. When such evidence was not forthcoming it invalidated the deportation order. Some years later new deportation proceedings were brought, but the court found them precluded by the prior judicial determination.[105] This holding actually depended, however, on the asserted conclusiveness of a judicial, rather than an administrative, order.

The finality of an administrative vindication, and its possible preclusion of further deportation proceedings on the same issue, thus has never been established. Eventually the courts may be persuaded to require some measure of res judicata, particularly if the statute remains silent. But a new hearing promptly conducted to remedy an inadequacy of evidence or a procedural defect might in some instances resemble a new trial in a judicial proceeding, which never has been subject to res judicata.

4. *Determination of a Claim to United States Citizenship*

In recent years there has been considerable discussion of the determination of claims to United States citizenship. Underlying this discussion is the conviction that American citizenship is a priceless boon, and that citizenship rights must be given the most scrupulous protection.[106] This

102 Bridges v. United States, 199 F.2d 811, 826 (9th Cir. 1952).

103 Bridges v. United States, 346 U.S. 209 (1953).

104 *Id.* at 228, 234.

105 Anselmo v. Hardin, 253 F.2d 165 (3d Cir. 1958).

106 See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Nishikawa v. Dulles, 356 U.S. 129 (1958); Perez v. Brownell, 356 U.S. 44, 78 (1958) (dissenting opinion); Barber v.

generous attitude has led to the development of special rules and extra precautions to shield the citizenship claimant.

It is clear that an administrative finding that a person involved in an exclusion or deportation proceeding is not an American citizen has no conclusive effect. In establishing their jurisdiction to order exclusion or deportation, the administrative authorities necessarily determine whether the person before them is a citizen.[107] But the administrative order can be questioned through the normal channels of judicial review on a claim of error of law or procedure or because of a lack of substantial evidence.[108] And a court reviewing a deportation order will itself conduct a de novo inquiry of a nonfrivolous claim to United States citizenship.[109] Moreover, whether he is within[110] or without[111] the United States, a citizenship claimant who has been denied a right or privilege as an American citizen can bring a declaratory judgment suit to vindicate his claim. In such a declaratory judgment suit also, the court disregards the administrative determination, and proceeds de novo.[112]

An administrative ruling that a person is an American citizen may take several forms, and in its context each of these may involve varying considerations. The person affected frequently has relied on such a determination for many years. In effect, the administrative determination has given him the indicia of citizenship of which he should not lightly be divested. While the courts never have applied any principle of res judicata, they have required some deference to the administrative ruling. To some extent the weight to be attached to the ruling may depend upon the formality of the proceeding and the reliance placed upon it.

The most obvious situation, perhaps, occurs when a person is admitted

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Gonzalez, 347 U.S. 637 (1954); Schneiderman v. United States, 320 U.S. 118, 158-59 (1943); Kwock Jan Fat v. White, 253 U.S. 454 (1920).

107 United States v. Sing Tuck, 194 U.S. 161 (1904); Marks v. Esperdy, 315 F.2d 673 (2d Cir. 1963), *cert. granted*, 375 U.S. 810 (1963); Hernandez-Avila v. Boyd, 294 F.2d 373 (9th Cir. 1961); United States *ex rel.* Lapides v. Watkins, 165 F.2d 1017 (2d Cir. 1948).

108 Tang Tun v. Edsell, 223 U.S. 673 (1912); United States v. Ju Toy, 198 U.S. 253 (1905).

109 Ng Fung Ho v. White, 259 U.S. 276 (1922); Frank v. Rogers, 253 F.2d 889 (D.C. Cir. 1958). The cases cited in note 108 *supra*, rejected such a right to a de novo judicial inquiry in a review of an exclusion, as distinguished from a deportation order. *But cf.* United States *ex rel.* Chu Leung v. Shaughnessy, 176 F.2d 249 (2d Cir. 1949); Lee Fong Fook v. Wixon, 170 F.2d 245 (9th Cir. 1948); Carmichael v. Delany, 170 F.2d 239 (9th Cir. 1948); United States *ex rel.* Medeiros v. Watkins, 166 F.2d 897 (2d Cir. 1948).

110 Immigration and Nationality Act § 360, 66 Stat. 273 (1952), 8 U.S.C. § 1503 (1958).

111 Rusk v. Cort, 369 U.S. 367 (1962).

112 Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952); Mah Ying Og v. McGrath, 187 F.2d 199 (D.C. Cir. 1950).

to the United States as a citizen. Here we encounter a variation of the theme we have previously explored, for if he was actually an alien, his admission was defective and theoretically is open to assault at any time. Yet the recognition of the citizenship claim obviously has introduced an additional factor.

Some earlier cases declared that previous allowance by immigration officers of admission as a citizen was entitled to little weight and could be disregarded if the authorities later found the entrant not to be a citizen.[113] More recent cases, however, have concluded that such a ruling has prima facie effect which can be overcome only by a clear, unequivocal and convincing showing that it was induced by fraud, or error of fact or of law.[114] The current attitude is illustrated by the following observations:

> Appellant acted in reliance on the board decision which resulted, as he was expected to do. The consequences for him are as grave as if that decision had been rendered by a court of law. . . . [T]he fact that past board proceedings may have been informal and summary does not warrant corrective procedures which fail to take account of the human values which have attached. If the Government is to turn the clock back after all these years, it should meet a standard of proof which is not meagre.[115]

The court here was speaking of an adjudicative ruling by a board of special inquiry, and its comments might not apply equally to a simple admission to the United States which did not entail a formal or considered adjudication. Moreover, it did not rule in terms of res judicata or estoppel, but, rather, spoke of the burden of disproof, conceding that the administrative ruling could be overcome by a convincing showing of fraud or error. Yet its holding does attach to admission to the United States as a citizen a degree of finality not accorded to admission as an alien.

A second type of administrative determination of American citizenship is the issuance by federal authorities of a document attesting to citizenship status such as a passport or a certificate of citizenship or of identity. Such a document usually is granted pursuant to statutory authority. It does not award citizenship, but recognizes that it exists and ordinarily is issued upon application and without a formal hearing.

113 Lum Mon Sing v. United States, 124 F.2d 21 (9th Cir. 1941); *In re* Wing, 124 F. Supp. 492 (N.D. Cal. 1954).

114 Lew Moon Cheung v. Rogers, 272 F.2d 354 (9th Cir. 1959); Lee Hon Lung v. Dulles, 261 F.2d 719 (9th Cir. 1958); *cf.* Montana v. Rogers, 278 F.2d 68 (7th Cir. 1960), *aff'd on other grounds*, 366 U.S. 308 (1961).

115 Lee Hon Lung v. Dulles, *supra* note 114, at 724.

The authorities appear to accord little weight to a passport, finding that the holder of such a document may be excluded if at the time of entry he is found not to be a citizen.[116] Other cases have dealt similarly with certificates of identity as citizens presented by applicants for entry.[117] Yet the Third Circuit has ruled that a letter from the Immigration Service expressing the view that a person in the United States is a citizen establishes a prima facie claim to citizenship, which can be dislodged only by clear, unequivocal and convincing evidence.[118] That decision appears to attach excessive weight to a mere letter but the principle it formulates may not be fully applicable in the entry cases since the statute specifically requires the exclusion or expulsion of those found inadmissible.

Another type of document issued by the immigration authorities is a certificate of citizenship, which attests that the applicant has acquired United States citizenship derivatively through a parent.[119] The statute directs that such a certificate "shall have the same effect in all courts, tribunals, or public offices of the United States" as a naturalization certificate issued by a court.[120] The statute also authorizes, without time limitation, an administrative proceeding to cancel such a certificate if it was illegally or fraudulently obtained.[121] These statutory prescriptions would appear to indicate that such an unrevoked certificate of citizenship must be accorded at least prima facie effect. But one court has found that a person could not resist deportation on the basis of unrevoked certificates of citizenship predicated on his alleged United States citizenship and issued to six of his children.[122] Although the case may be distinguishable from what appears the intended reach of the statute since the certificates were not issued to the complaining party himself, the court's reasoning is sweeping and concludes that the certificate falls if the evidence on which it was based is discredited. Another court found a criminal prosecution maintainable against the holder of an unrevoked

116 Louie Hoy Gay v. Dulles, 248 F.2d 421 (9th Cir. 1957); Ng Yip Yee v. Barber, 210 F.2d 613 (9th Cir. 1954), *cert. denied*, 347 U.S. 988 (1954); Wah v. Shaughnessy, 190 F.2d 488 (2d Cir. 1951).

117 Wong Kwok Sui v. Boyd, 285 F.2d 572 (9th Cir. 1960); United States *ex rel.* Lapides v. Watkins, 165 F.2d 1017 (2d Cir. 1948). See also Chin Kai Su v. Dulles, 157 F. Supp. 190 (E.D.N.Y. 1957).

118 Delmore v. Brownell, 236 F.2d 598 (3d Cir. 1956).

119 Immigration and Nationality Act § 341, 66 Stat. 263 (1952), 8 U.S.C. § 1452 (1958).

120 Immigration and Nationality Act § 332(e), 66 Stat. 252 (1952), 8 U.S.C. § 1443(e) (1958).

121 Immigration and Nationality Act § 342, 66 Stat. 263 (1952), 8 U.S.C. § 1453 (1958). The administrative procedure for such cancellations is prescribed in 8 C.F.R. § 342.1 (1958).

122 Reyes v. Neelly, 264 F.2d 673 (5th Cir. 1959).

certificate of citizenship for fraud in its procurement.[123] Again, the facts are distinguishable, but the court declared that the certificate was open to collateral attack and that the statutory cancellation procedure was discretionary, not mandatory.

These expressions seem out of line with the current weight of authority in related areas. The better view would appear to be that such a certificate of citizenship is entitled at least to prima facie effect. Indeed, the statutory provisions we have mentioned may require that the certificate be recognized unless revoked. The Attorney General has ruled that an unrevoked certificate of citizenship must be honored by the officers of the State Department and other government agencies.[124] The Attorney General's opinion did not deal directly with the possibility that such an unrevoked certificate might be disregarded in exclusion or deportation proceedings, which can be directed only against aliens. The thrust of his opinion, however, and the language of the statute, appear to favor regard for the certificate.

A third type of citizenship determination stems from certifications of birth issued by state authorities. The effect given to such documents depends to some extent on state law and on the nature of the record. Ordinarily, a contemporaneous record of birth in the United States will be accepted as almost conclusive of an issue involving the acquisition of United States citizenship.[125] Most states, however, also make provision for the recording of delayed (*nunc pro tunc*) birth certificates, often in a court proceeding. Such certificates at most are entitled to prima facie effect and will be given little weight if the record discloses that they were based on tenuous evidence.[126]

II. Equitable Estoppel

To some extent our previous discussion has concerned the possibility of estoppel. However, the authorities generally have not explored this concept. But, when directly confronted by a plea of estoppel, the courts usually have declared that the United States cannot be estopped by a prior determination of one of its officers.

We turn now to another aspect of estoppel. Is the Government subject to an equitable estoppel when a person's disadvantageous actions re-

123 United States v. Chin Doong Art, 180 F. Supp. 446 (E.D.N.Y. 1960). See also Lem v. Rogers, 180 F. Supp. 445 (E.D.N.Y. 1959).

124 *In re* Flegenheimer, 41 Ops. Att'y Gen. No. 79 (1960).

125 Liacakos v. Kennedy, 195 F. Supp. 630 (D.D.C. 1961).

126 Louie Hoy Gay v. Dulles, 248 F.2d 421 (9th Cir. 1957); Casares-Moreno v. United States, 226 F.2d 873 (9th Cir. 1955); Mah Toi v. Brownell, 219 F.2d 642 (9th Cir. 1955), *cert. denied*, 350 U.S. 823 (1956).

sulted from misrepresentation or other improper conduct of a government officer?

Modern jurisprudence exhorts the government to observe the highest precepts of rectitude in dealing with its citizens. At the same time, there is a strong feeling that the actions of a single officer should not be permitted to override legislative programs or policies that can be formulated only by Congress. As between these competing considerations, the trend of current decisions appears to reflect that the impulse for fair dealing usually will prevail in immigration and nationality matters.[127] In any event, of course, an equitable estoppel would not arise in the case of an illegal resident merely because of sympathetic considerations, based on long residence and established family ties, when no improper or misleading official action is charged.[128]

In *Montana v. Kennedy*[129] the estoppel issue was squarely presented by a citizenship claimant who asserted that, although he actually was born in Italy in 1906, the Government should be estopped from denying that he was born in the United States because his birth in this country was prevented by the improper action of an American consul in refusing an American passport to his pregnant mother. The Supreme Court explicity avoided direct consideration of the estoppel issue, finding that the claimant's mother had not needed a passport to return to the United States and that there had been no persuasive showing of improper action by the consul.

There were obvious difficulties in finding that Montana had acquired United States citizenship under a constitutional and statutory mandate restricting this title to persons actually born in the United States. In *McLeod v. Peterson*,[130] however, the court was able to overcome a similar obstacle. There an alien sought suspension of deportation. A prerequisite for such suspension was continuous physical presence in the United States during a specified period but the applicant had been advised by immigration officers to leave the United States after a previous application for suspension of deportation had erroneously been denied. In finding that the applicant had complied with the requirement of continuous physical presence, the court did not specifically refer to estoppel, but remarked:

127 See McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960); *In re* Vacontios' Petition, 155 F. Supp. 427 (S.D.N.Y. 1957); Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954). See also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157, 158 (1963), which assumes the Government can be estopped but finds no basis for estoppel in the facts.

128 Kalatjis v. Rosenberg, 305 F.2d 249 (9th Cir. 1962).

129 366 U.S. 308 (1961).

130 283 F.2d 180 (3d Cir. 1960).

> To yield to this argument would be to become a party to a "bootstrap" operation by means of which officers of the United States seek to turn their own error, however innocent, into a bar to the assertion of a right by the victim of this very error.[131]

Another facet of this problem is presented in *United States v. Anastasio*,[132] which refused denaturalization premised on an antecedent fraud in a registry proceeding. The court found that the Government was "in an inequitable position," since Anastasio had been naturalized on the basis of honorable military service and apparently could have obtained a new registry certificate currently. It declared that in a denaturalization suit the Government must cut square corners, thus reversing its position in the usual expressions of the "square corners" aphorism. Estoppel was not mentioned, but the court relied heavily on the fact that the Government's files at the time of naturalization contained evidence of the fraud, although this information was not actually known to the examiner. Straining to attain a desirable result, the court ruled, somewhat questionably, that the Government was not defrauded. The decision thus rests on an evaluation of fraud rather than of estoppel.

Other rulings have been regarded as concerned with estoppel, but they too appear to rest on different considerations. Thus, a leading treatise[133] cites *Moser v. United States*[134] as an instance of a situation in which the Government can be estopped. Moser had applied for relief from military service in this country and thus was deemed to have forfeited his right to apply for American citizenship. He claimed to have acted in reliance on advice from his country's embassy, which in turn had been guided by the Department of State. The Supreme Court ruled that the statute accorded Moser a choice between citizenship benefits and exemption from military service and that the official misinformation had denied him the opportunity to make a free choice. Although there are some overtones of estoppel, the decision appears to have dealt with whether the individual had made a voluntary choice, rather than with an estoppel against the Government. This evaluation seems confirmed by the subsequent rulings of the lower courts, most of which have decided that a free choice was made in the cases before them.[135]

131 *Id.* at 187.

132 226 F.2d 912, 919 (3d Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

133 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 17.02, at 501 (1958).

134 341 U.S. 41 (1951).

135 See Ceballos v. Shaughnessy, 352 U.S. 599 (1957); Machado v. McGrath, 193 F.2d 706 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 948 (1951); Matter of Planas, 152 F. Supp. 456 (D.N.J. 1957); Petition of Sally, 151 F. Supp. 888 (S.D.N.Y. 1957); Petition of Kutay, 121 F. Supp. 537 (S.D. Cal. 1954); Petition of Berini, 112 F. Supp. 837 (E.D.N.Y. 1953); Hichino Uyeno v. Acheson, 96 F. Supp. 510 (W.D. Wash. 1951) (since Govern-

Another situation in which some commentators have said the Government can be estopped arises from the alleged loss of United States citizenship. In contrast to *Montana*, which involved the initial acquisition of citizenship, these cases involve voluntary action to shed an established status. They typically arise when the citizen is alleged to have lost his status by failing to come to the United States within a prescribed time or by performing an act of expatriation. He asserts that his delay in returning was caused by the failure or refusal of the American consul to issue the necessary documents[136] or that the affirmative act of expatriation resulted from the consul's misinformation that he was not an American citizen.[137] Such pleas, if substantiated, have averted a finding that citizenship was lost but the decisions do not appear to have been motivated by a concept of estoppel. Rather, they have proceeded on a finding that the citizen had not voluntarily relinquished his citizenship status and had substantially complied with the conditions for its retention. Although the courts in these cases sometimes have spoken in terms of estoppel, it seems clear that they actually were concerned with the voluntary action which is an essential ingredient of expatriation.[138]

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ment prevented return, it is not in position to say that failure to return caused loss of citizenship). See, however, dictum in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157-58 (1963), which cites *Moser* in stating the United States may be estopped, and thus appears to support Professor Davis' reading of *Moser*.

136 Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954) (same, "the weight of authority, admittedly not too impressive, sustains the conclusion"); Moldoveanu v. Dulles, 168 F. Supp. 1, 7 (E.D. Mich. 1958) ("simple justice requires that the defense of noncompliance be unavailable to Government when its own restraint induced the failure to return."); Lee Hong v. Acheson, 110 F. Supp. 60 (N.D. Cal. 1953) (same, had substantially complied with statute); Lee Bang Hong v. Acheson, 110 F. Supp. 48 (D. Haw. 1951) (failure to return before 16th birthday caused by consul's failure to process application for passport); Repetto v. Acheson, 94 F. Supp. 623 (N.D. Cal. 1950) (same, return "prevented through no fault of her own"); Matter of S—, 8 I. & N. Dec. 226 (1958) (same, did not return because of circumstances beyond control). See also Lee You Fee v. Dulles, 236 F.2d 885, 887 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 61 (1957) (since application to return was made after citizenship was lost, there was no occasion to consider whether Government was estopped); United States *ex rel.* Lapides v. Watkins, 165 F.2d 1017, 1019 (2d Cir. 1948) (no estoppel against Government even though consul allegedly induced belief time to return was extended).

137 Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950) (not expatriated by foreign military service, since his situation resulted from erroneous advice of State Department and actions not voluntary); DiGirolamo v. Acheson, 101 F. Supp. 380 (D.D.C. 1951) (same); Matter of P—, 9 I. & N. Dec. 362 (1961) (same); Matter of G—, 9 I. & N. Dec. 64 (1960) (same, regarded as constructively present in U.S.). Of interest in this connection are the rulings that a person who was unaware of his claim to United States citizenship did not voluntarily relinquish such citizenship by taking oath of allegiance to a foreign country or by other acts of expatriation. Rogers v. Patokoski, 271 F.2d 858 (9th Cir. 1959); Matter of C— S—, 9 I. & N. Dec. 670 (A.G. 1962); Matter of C— A—, 9 I. & N. Dec. 482 (1961).

138 Among the numerous decisions underscoring the need for voluntariness in

Mention should also be made of *Ackermann v. United States*,[139] which was an effort to reopen a denaturalization judgment from which the defendant had not appealed when later adjudications indicated that such an appeal would have been successful. The decision not to appeal was said to have been influenced by the advice of an immigration official at a time when Ackermann was in detention as an alien enemy during World War II. Reopening was refused on the ground that there had been a considered choice not to appeal. Since the immigration officer was not in a fiduciary relationship and had not been guilty of misrepresentation or undue influence, the Court found no basis for relief.[140]

Thus, while there has been some talk of equitable estoppel against the Government in immigration and nationality matters, the issue seldom has been directly adjudicated. The cases do demonstrate, however, that the prevailing judicial climate clearly is opposed to any unfairness in the actions of government officers. Therefore, it is not inconceivable that under appropriate circumstances equitable estoppel may be successfully urged against the Government.

III. Effect of Judicial Determination in Subsequent Administrative Proceeding

The discussion to this point has been concerned primarily with the effect of administrative actions. It turns now to the effect of judicial rulings. Certain types of court decisions conclude the administrative process. A definitive interpretation of a statute, for instance, particularly by a court of last resort, is controlling. Sanctions attach to disobedience to the direct command of a court in a specific case. Our attention is directed rather to judicial determinations which do not touch the administrative process directly but determine issues which arise in a subsequent administrative proceeding. Such determinations to some extent appear to summon the principle of collateral estoppel, under which a court's final adjudication of an issue precludes relitigation of the same issue between the same parties in another lawsuit.[141] Complications are introduced, however, by the differences between the judicial and the

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expatriation are Nishikawa v. Dulles, 356 U.S. 129 (1958); Mackenzie v. Hare, 239 U.S. 299 (1915). Such voluntariness results from the objective wish to perform the expatriating act, rather than a subjective desire to cast off American citizenship. Perez v. Brownell, 356 U.S. 44 (1958); Savorgnan v. United States, 338 U.S. 491 (1950).

139 340 U.S. 193 (1950).

140 *Cf.* later explanation of the *Ackermann* case in Polites v. United States, 364 U.S. 426, 431-33 (1960).

141 See Commissioner v. Sunnen, 333 U.S. 591 (1948); Restatement, Judgments Introductory Note to ch. 3, at 159, § 45, comment *c*, § 68 (1942); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942).

administrative process, and by the difficulty sometimes encountered in deciding whether there is identity in parties and issues.

1. *Citizenship Claims*

A direct determination, in a suit for declaratory judgment, that a party is an American citizen, is conclusive for all purposes unless and until it is rescinded by the court.[142] A collateral finding, in a litigation dealing also with other issues, by a court that a person is an American citizen, may be conclusive of subsequent administrative determinations if it appears that the parties are the same and that the court resolved the issue of citizenship.[143] But if the court did not specifically adjudicate the title to American citizenship or if there is not an identity of parties before the court and the administrative authorities, the court's ruling will have no effect on the subsequent consideration of the citizenship issue.[144]

A judicial determination unfavorable to a citizenship claimant, on the other hand, may also be deemed to be conclusive. Dismissal on the merits in a suit for declaratory judgment of citizenship may preclude a new suit to obtain such a declaration,[145] and may collaterally estop a claim of citizenship in a subsequent deportation proceeding.[146] But no case has arisen collaterally estopping a claim of citizenship because of a judicial determination adverse to the claim made in an earlier litigation dealing with other issues. Such an estoppel apparently would be limited by the judicial solicitude for citizenship claims and by the caution which must be exercised to avoid barring or expelling a citizen from the United States.

142 See Mackey v. Mendoza-Martinez, 362 U.S. 384 (1960), remanding to ascertain whether citizenship was adjudicated in a prior criminal prosecution. Upon such remand, it was found that there had been no such finding. See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). *Cf.* Ah How v. United States, 193 U.S. 65 (1904); *Ex parte* Mac Fock, 207 Fed. 696 (W.D. Wash. 1913), holding that a Chinese person holding a certificate from a United States Commissioner showing that he was discharged from custody as a citizen, nevertheless could be deported as an alien. *Cf.* Leung Jun v. United States, 171 Fed. 413 (2d Cir. 1909), finding such a discharge res judicata when the certificate showed it was issued by the Commissioner on the basis of evidence produced before him at a hearing.

143 See Mackey v. Mendoza-Martinez, 362 U.S. 384 (1960).

144 See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

145 Leung Gim v. Brownell, 238 F.2d 77 (9th Cir. 1956) (dismissed for lack of jurisdiction); Ma Chuck Moon v. Dulles, 237 F.2d 241 (9th Cir. 1956) (dismissed for failure to sustain burden of proof).

146 Matter of W— K— W—, 9 I. & N. Dec. 235 (1961); Matter of J— J—, 9 I. & N. Dec. 320 (1961). *Cf.* Matter of H—, 7 I. & N. Dec. 407 (1957), apparently overruled but not mentioned in above cases. If dismissal is not on the merits, the issue may be raised in later judicial or administrative proceedings. Fujii v. Dulles, 259 F.2d 866 (9th Cir. 1958); Matter of T—, 8 I. & N. Dec. 244 (1959).

It is unlikely, in any event, that the rules of estoppel will be applied to shut off the presentation of a citizenship claim that may be valid. While a prior judicial ruling of the underlying facts ordinarily will not be re-examined in subsequent proceedings, it seems likely that the citizenship claimant can urge legal concepts favoring the citizenship claim but not urged in the prior proceeding. (This is probably so even if the new legal grounds developed from decisions rendered subsequent to the prior proceeding to which the claimant was a party.) And if the denial of opportunity to urge a citizenship claim appears inequitable, the courts unquestionably would require that such opportunity be given.

2. *Alienage and Other Collateral Questions*

In a few instances a court's prior decision on an issue has been urged as a collateral estoppel for presentation of like issues in a deportation proceeding. For instance, the Government must establish that the respondent in a deportation proceeding is an alien[147] and, since an alien by definition is a person who is not a citizen or national of the United States,[148] a direct court holding that a person is not a citizen may simplify the Government's case in establishing that he is an alien.[149] Or, if the court has specifically ruled that a person is an alien, as in a criminal prosecution for unlawful entry or re-entry as an alien, its decision may establish that fact for the purposes of a deportation proceeding.[150]

When a deportation charge is premised on fraud in obtaining a visa or in entry, a criminal conviction for the same charge may be binding in the deportation proceeding[151] if the criminal charge is identical with that in the deportation proceeding.[152] But, on the other hand, state court conviction as a narcotics addict did not itself support a deportation charge for drug addiction, since the parties were different and the state and federal statutes did not relate to identical offenses.[153] Similarly indecisive have been efforts to rely on criminal convictions or denaturalization judgments predicated on a defendant's Communist Party membership as establishing such membership for the purposes of a deportation pro-

147 Bilokumsky v. Tod, 263 U.S. 149 (1923); McNeil v. Kennedy, 298 F.2d 323 (D.C. Cir. 1962); Wong Kwok Sui v. Boyd, 285 F.2d 572 (9th Cir. 1960).

148 Immigration and Nationality Act § 101(a)(3), 66 Stat. 166 (1952), 8 U.S.C. § 1101(a)(3) (1958).

149 See note 146 *supra*.

150 United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Cal. 1959).

151 Matter of Z—, 5 I. & N. Dec. 708 (1954).

152 Matter of Marinho, 10 I. & N. Dec. (I.D. 1273, 1963).

153 Matter of K— C— B—, 6 I. & N. Dec. 374 (1954).

ceeding.[154] One court found that since the defendant had not testified in the earlier denaturalization case and now wanted the opportunity to testify, application of the doctrine of collateral estoppel would be unfair, particularly since later Supreme Court decisions had formulated a new definition of meaningful Communist Party membership.[155] Moreover, the court declared that the refusal to permit respondent in the deportation proceeding to testify concerning his alleged Communist Party membership denied him the full hearing assured by the statute. Generally it appears the impact of collateral estoppel in deportation hearings will be slight and will be limited to situations in which an issue has been clearly and necessarily resolved by a court, and in which resort to this doctrine will not be inequitable.

3. *Conviction of Crime as Basis for Deportation*

The statute prescribes deportation for certain aliens who have been convicted of crimes involving moral turpitude.[156] In many such situations the affected aliens have sought to establish in the deportation proceeding that they were not guilty of the crime of which they were convicted, that the criminal proceedings were defective or incomplete, or that the crime for which they were convicted did not involve moral turpitude.

Since the premise of deportation in such cases is a *conviction* for crime, it is settled that the immigration authorities cannot ordinarily be called upon to retry the criminal case or to pass upon a plea that the alien actually was not guilty of the crime for which he was convicted.[157] Nor can they examine the particular circumstances to determine if turpitude actually was involved.[158] The official record of conviction settles the issues of guilt and of the precise crime for which the conviction occurred.[159] The turpitude of the offense is assessed by its inherent nature rather than by the particular circumstances.[160] But a convicted alien can contend

154 Title v. INS, 322 F.2d 21 (9th Cir. 1963), which overruled Matter of C—, 8 I. & N. Dec. 577 (1960).

155 *Id.* See Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Rowoldt v. Perfetto, 355 U.S. 115 (1957).

156 Immigration and Nationality Act § 241(a)(4), 66 Stat. 204 (1952), 8 U.S.C. § 1251(a)(4) (1953).

157 United States *ex rel.* McKenzie v. Savoretti, 200 F.2d 546 (5th Cir. 1952); Mercer v. Lence, 96 F.2d 122 (10th Cir.), *cert. denied*, 305 U.S. 611 (1938); United States *ex rel.* Mylius v. Uhl, 210 Fed. 860 (2d Cir. 1914).

158 United States *ex rel.* Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939); Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).

159 United States *ex rel.* Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933).

160 *Ibid.*; Ablett v. Brownell, 240 F.2d 625 (D.C. Cir. 1957); United States *ex rel.* Guarino v. Uhl, 107 F.2d 339 (2d Cir. 1939); United States *ex rel.* Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931).

that the conviction was not for a crime involving moral turpitude,[161] that the conviction must be disregarded because it is void on its face,[162] or because it was a conviction in absentia,[163] or because the offense to which it relates was not actually a crime,[164] or because the conviction was invalid for failure to observe constitutional requirements.[165] And he can assert that there actually was no conviction,[166] or that the conviction was not final, since only a final conviction may incur deportability under this phase of the statute.[167]

These efforts to limit the effect of a criminal conviction do not involve res judicata or estoppel. In effect, they seek to inquire whether the conditions prescribed by the statute have been met: They measure compliance with statutory prerequisites rather than the binding effect of adjudications.

IV. Effect of Judicial Determination in Subsequent Judicial Proceeding

To some extent immigration and nationality problems may be resolved by the courts in proceedings for judicial review, for declaratory judgments, for naturalization and denaturalization and in criminal prosecu-

161 United States *ex rel.* Freislinger v. Smith, 41 F.2d 707 (7th Cir. 1930); Wilson v. Carr, 41 F.2d 704 (9th Cir. 1930).

162 Jordan v. De George, 341 U.S. 223 (1951).

163 *Ex parte* Koerner, 176 Fed. 478 (E.D. Wash. 1909); *Ex parte* Watchorn, 160 Fed. 1014 (S.D.N.Y., 1908); 22 C.F.R. §§ 42.91(a)(9)(v), 41.91(a)(9)(iv) (1961); *cf.* Weinbrand v. Prentis, 4 F.2d 778 (6th Cir. 1925) (given notice and opportunity to be present); Matter of V— D— B—, 8 I. & N. Dec. 608 (1960) (same, appeared later, paid fine, took no appeal).

164 *Ex parte* Isojoki, 222 Fed. 151 (N.D. Cal. 1915); Matter of C—, 2 I. & N. Dec. 367 (1945); 22 C.F.R. §§ 42.91(a)(9)(i), 41.91(a)(9)(i) (1961). Thus juvenile delinquency, prosecuted as such, is not regarded as a crime. Matter of T—, 6 I. & N. Dec. 835 (1955); Matter of C— M—, 5 I. & N. Dec. 327 (1953). However, the result is different if the offender is prosecuted as an adult. United States *ex rel.* Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954), *cert. denied,* 348 U.S. 964 (1955); *cf.* Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962) (Federal Youth Corrections Act, 18 U.S.C. § 5010(b) (1952)); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958) (court found he would be treated as a juvenile under modern standards). Moreover, the state designation of the information as an "offense," rather than a crime, will not necessarily be controlling, since a uniform federal standard is contemplated. Babouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959) (soliciting men to commit crime against nature).

165 United States *ex rel.* Durante v. Holton, 228 F.2d 827 (7th Cir.), *cert. denied,* 351 U.S. 963 (1956); United States *ex rel.* Marino v. Holton, 227 F.2d 886 (7th Cir.), *cert. denied,* 350 U.S. 1006 (1955).

166 A court martial conviction by American military forces in a foreign country is deemed not a conviction for this purpose. Gubbels v. Hoy, 261 F.2d 952 (9th Cir. 1958).

167 Pino v. Landon, 349 U.S. 901 (1955). However, a conviction followed by a suspended sentence is deemed a final conviction for this purpose. Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959).

tions. A discussion of the impact of concepts of finality on the administrative process, therefore, would not be complete without a brief consideration of the treatment of similar concepts in such judicial proceedings.

1. *Judgment in Proceeding for Judicial Review*

Judicial review of exclusion and deportation orders developed, in the absence of direct statutory authorization for such review, through the writ of habeas corpus, which challenged the legality of the detention.[168] After enactment of the Administrative Procedure Act in 1946,[169] an additional remedy emerged through a proceeding for declaratory review and injunction.[170] In 1961, Congress codified the right to statutory review, providing that final deportation orders could be questioned only by a direct review in an appropriate United States Court of Appeals[171] and that exclusion orders could be challenged only through habeas corpus.[172] The right to habeas corpus also was preserved for aliens in custody under deportation orders.[173]

To the extent that judicial review has been sought through habeas corpus, the traditional judicial attitude toward that writ has repulsed any concept of finality for a decision denying habeas corpus relief. An unsuccessful habeas corpus petition never has prevented the petitioner from bringing new habeas corpus proceedings.[174] Indeed, in some instances successive habeas corpus writs have been aimed at the same administrative order, and occasionally a fourth or fifth habeas corpus writ has been successful.[175] However, the courts are required to give controlling weight to the prior adjudication unless a new ground for relief is presented and unless they are satisfied that the ends of justice will be served by further inquiry.[176]

This picture has changed somewhat with the development of review

168 Heikkila v. Barber, 345 U.S. 229 (1953).

169 Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

170 Ceballos v. Shaughnessy, 352 U.S. 599 (1957) (denial of discretionary relief); Brownell v. Tom We Shung, 352 U.S. 180 (1956) (exclusion order); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955) (deportation order).

171 Immigration and Nationality Act § 106(a), 66 Stat. 175 (1952), 8 U.S.C. § 1105 (1958), as amended, 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a) (Supp. IV, 1963). The orbit of the "final deportation orders" reviewable under this statute has been interpreted broadly by the Supreme Court in Foti v. INS, 375 U.S. 217 (1963).

172 Sec. 106(b).

173 Sec. 106(a)(9).

174 The applicable rules are reviewed and restated, with increased emphasis on liberality in entertaining new writs, in Sanders v. United States, 373 U.S. 1 (1963).

175 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Price v. Johnston, 334 U.S. 266 (1948).

176 Price v. Johnston, *supra* note 175; Wong Doo v. United States, 265 U.S. 239 (1924); 28 U.S.C. § 2244 (1959). *Cf.* Sanders v. United States, 373 U.S. 1 (1963).

by declaratory judgment and injunction. Although it has been said that the new remedies affect only the form of the action and not the scope of review,[177] the weight of authority has tended to apply the principles of res judicata to bar a second review of an order already upheld in a prior review proceeding.[178] Review was not deemed, however, precluded in regard to causes of action not previously adjudicated, such as determinations relating to discretionary relief[179] and the fixing of a place of deportation.[180] And experience has shown that courts do not apply the principle of res judicata rigidly in such circumstances, where the new proceeding advances substantial constitutional claims or makes a substantial showing of manifest injustice.[181]

The 1961 statute codifying a right to judicial review was designed to minimize multiple attacks on deportation and exclusion orders. It commanded that every petition for habeas corpus or for review addressed to an exclusion or deportation order state whether and in what particulars the order was upheld in any prior judicial proceeding.[182] No such petition for review or for habeas corpus may be entertained if the order was previously upheld, unless it presents new grounds not formerly available or shows that the prior remedy was inadequate or ineffective.[183]

A final court decision sustaining a challenge to a deportation order in a habeas corpus or review proceeding usually ends the matter. It is conceivable, however, that the alien may be subject to further proceedings, particularly if new or different deportation charges are pressed. If the basis for invalidating the administrative order was a remediable defect in proof or procedure, the court may remand the case for further administrative consideration.[184] If it vacates the order without reservation, it still may be possible for the administrative authorities to bring new proceedings untainted by the prior defect.[185]

177 Brownell v. Tom We Shung, 352 U.S. 180, 183, 186 (1956); Frank v. Rogers, 253 F.2d 889 (D.C. Cir. 1958); United States *ex rel.* Brzovich v. Holton, 222 F.2d 840 (7th Cir. 1955). *Cf.* Fugiani v. Barber, 261 F.2d 709 (9th Cir. 1958) (dissenting opinion).

178 Cruz-Sanchez v. Robinson, 249 F.2d 771 (9th Cir. 1957); Estevez v. Nabers, 219 F.2d 321 (5th Cir. 1955); Spinella v. Esperdy, 188 F. Supp. 535 (S.D.N.Y. 1960).

179 Williams v. Sahli, 292 F.2d 249 (6th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962); Wolf v. Boyd, 238 F.2d 249 (9th Cir. 1956), *cert. denied*, 353 U.S. 936 (1957).

180 Ying v. Kennedy, 292 F.2d 740 (D.C. Cir.), *cert. denied*, 368 U.S. 914 (1961); United States *ex rel.* Tom Man v. Murff, 264 F.2d 926 (2d Cir. 1959).

181 See Mackay v. Turner, 283 F.2d 728 (9th Cir.), *stay denied*, 364 U.S. 888 (1960); Jimenez v. Barber, 252 F.2d 550 (9th Cir.), *stay denied*, 355 U.S. 943 (1958).

182 Immigration and Nationality Act § 106(c), 66 Stat. 175 (1952), 8 U.S.C. § 1105(a) (1958), as amended, 75 Stat. 653 (1961), 8 U.S.C. § 1105a(c) (Supp. IV, 1963).

183 *Ibid.*

184 Mahler v. Eby, 264 U.S. 32 (1924).

185 See Bovinas v. Savoretti, 146 F. Supp. 274 (S.D. Fla. 1956) (court specifically

2. *Decree of Naturalization*

Under our constitutional and statutory scheme, naturalization always has been entrusted to designated state and federal courts.[186] Consideration of a petition for naturalization is a judicial proceeding in which the United States is always a potential adverse party.[187] A naturalization decree rendered by a court in this country, like other judgments, can be challenged on appeal to a higher court.[188] And, so long as it is unrevoked, unless void on its face,[189] it cannot be collaterally questioned by any other court or agency.[190]

Since 1906, however, the naturalization statutes have provided, without time limitation, for a judicial proceeding to revoke a decree of naturalization obtained through fraud or illegality.[191] In a series of early decisions, the Supreme Court upheld the constitutionality and propriety of the revocation procedure.[192] The argument of res judicata was squarely faced for the first time in *United States v. Ness*.[193] The Government had opposed a grant of naturalization because the requisite certificate of arrival was not attached to the petition and immediately after its objection was overruled, brought suit to revoke the naturalization. In ruling for the Government, Mr. Justice Brandeis observed:

> It was the purpose of Congress, by providing for appearances under § 11, to aid the court of naturalization in arriving at a

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stated ruling without prejudice to new proceedings). *Cf.* Bridges v. United States, 346 U.S. 209, 234 (1953) (dissenting opinion) (prior judicial decision vacating deportation order not res judicata); Bridges v. Wixon, 144 F.2d 927 (9th Cir. 1944), *rev'd on other grounds*, 326 U.S. 135 (1945) (prior administrative dismissal not res judicata); Matter of S—, 9 I. & N. Dec. 678 (1962) (prior Board decision became law of the case). Anselmo v. Hardin, 253 F.2d 165 (3d Cir. 1958), was to the contrary but it appears to rest on an erroneous view of the applicability of res judicata to habeas corpus judgments and of the function of a reviewing court in invalidating administrative actions.

186 The constitutional base is U.S. CONST. art. I, § 8. The present statutory implementation is Immigration and Nationality Act § 310, 66 Stat. 239 (1952), 8 U.S.C. § 1421 (1958). See Holmgren v. United States, 217 U.S. 509 (1910).

187 Tutun v. United States, 270 U.S. 568 (1926). See also Bindczyck v. Finucane, 342 U.S. 76 (1951).

188 Tutun v. United States, *supra* note 187.

189 Yamashita v. Hinkle, 260 U.S. 199 (1922).

190 Spratt v. Spratt, 29 U.S. (4 Pet.) 392 (1830); Campbell v. Gordon, 10 U.S. (6 Cranch) 175 (1810); Lakebo v. Carr, 111 F.2d 732 (9th Cir. 1940); Annot., 6 A.L.R. 407 (1920). Such a consequence also might attach, because of principles of comity, to a naturalization decree entered by a foreign court. MacKay v. McAlexander, 268 F.2d 35, 38 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960).

191 The present statute is Immigration and Nationality Act § 340, 66 Stat. 260 (1952), 8 U.S.C. § 1451 (1958).

192 Luria v. United States, 231 U.S. 9 (1913); Johannessen v. United States, 225 U.S. 227 (1912).

193 245 U.S. 319 (1917).

> correct decision and so to minimize the necessity for independent suits under § 15. . . . But in our opinion § 11 and § 15 were designed to afford cumulative protection against fraudulent or illegal naturalization.[194]

Eleven years later Mr. Justice Holmes rejected a res judicata argument in another suit for revocation for illegal naturalization without a certificate of arrival, although an effort had been made to supply the certificate *nunc pro tunc*. Mr. Justice Holmes found the power to revoke adequately authorized by "the express words" of the statute.[195]

More recent expressions of the highest court have not retreated from these conclusions, although direct confrontations have been avoided. In the *Schneiderman* case, the Court assumed the existence of the power to revoke for illegal procurement, while holding that Schneiderman's naturalization had not been illegally procured.[196] *Knauer v. United States*,[197] was a denaturalization for fraud in the oath of allegiance. Again the Court did not pass on a contention that the naturalization judgment was res judicata, finding that the fraud had occurred after the judgment, and therefore fraud in the oath had not been in issue at the time the judgment was rendered. More recently the plea of res judicata was raised in *Chaunt v. United States*, and was rejected by the lower court.[198] The issue was not considered by the Supreme Court when the case was reversed on other grounds.[199] And in *Costello v. United States*,[200] the Supreme Court rejected a plea that laches barred a denaturalization suit for fraud, brought twenty-seven years after the naturalization, finding that even if such a defense could be made there had been no showing of laches.

Thus, there appears to be no indication that the Supreme Court is prepared to abandon its past decisions upholding the statutory authority to revoke naturalizations improperly granted. *Costello* in fact appears to say that the power to denaturalize for fraud will be upheld against any challenge. And it is difficult to believe that the Court would reject the language of the statute and its own past explicit holdings and find that a naturalization judgment could not be revoked for illegality.

194 *Id.* at 327.

195 Maney v. United States, 278 U.S. 17, 22-23 (1928).

196 Schneiderman v. United States, 320 U.S. 118, *rehearing denied*, 320 U.S. 807 (1943).

197 328 U.S. 654, 670-71 (1946).

198 270 F.2d 179, 184 (9th Cir. 1959).

199 Chaunt v. United States, 364 U.S. 350 (1960).

200 365 U.S. 265 (1961). Followed in United States v. Oddo, 314 F.2d 115 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963).

As matters stand, the statute and the judicial decisions sanction a suit at any time after naturalization to revoke the naturalization judgment for illegality, concealment of a material fact, or wilful misrepresentation in its inception; and pleas that the naturalization judgment was res judicata have not prevailed.[201]

V. Conclusion

It is clear enough that questions concerning the finality of prior rulings or actions have been raised quite frequently in immigration and nationality matters. It is equally clear that it would be futile to attempt to fashion a consistent rule to be universally applied. Through the years it appears to have been the dominant rule that the Government could not be estopped by the rulings or actions of its officers. It is easy to see that the tides of change have weakened the force of the rule in some areas, particularly when citizenship status has been involved or when government officers are alleged to have acted unfairly. One cannot foresee how far those tides will carry us, but the trend seems to favor increased security of status for those who have relied on government actions over long periods of time.

In some aspects, any change would require an amendment of the statute. In other areas, a change would entail re-examination of judicial decisions, in the light of altered conditions and developing legal concepts. In other situations, it would require embarking into territory not previously explored. The aim of future consideration of this problem no doubt will be to reach a reasonable accommodation between the need to safeguard and implement government policies and the desire to avoid excessive dislocation of individual destinies and to assure a high degree of fairness in dealings between the Government and the individual.

201 See also DeLucia v. Flagg, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1962); United States v. Accardo, 113 F. Supp. 783 (D.N.J.), *aff'd per curiam*, 208 F.2d 632 (1953), *cert. denied*, 347 U.S. 952 (1954); United States v. Marino, 27 F. Supp. 155 (S.D.N.Y. 1939); United States v. Parisi, 24 F. Supp. 414 (D. Md. 1938). The absence of a statute of limitations is confirmed in United States v. Hauck, 155 F.2d 141, 143 (2d Cir. 1946).